The importance of fundamental structural language in the law of obligations

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Posted on March 29, 2014 by mhogg

This blogger is currently researching and writing a new book (to be published by Cambridge University Press under the title "Obligations: Law and Language") on fundamental structural language in the law of obligations. Many fields of law, including obligations, rely on such language to provide basic building blocks for the law and when analysing the nature of obligations and the consequences flowing from them (including remedies). In the law of obligations, such language includes terms such as 'obligations' itself, 'liability', 'conditional', 'contingent', 'unilateral', 'bilateral', 'mutual, 'independent', 'gratuitous', 'onerous', 'injury', and 'harm', amongst others. Although such language is frequently used by the courts (and legislators), it is often unclear which of a number of senses is intended in a specific instance of usage of a term. The purpose of my intended book will be to explore the meanings of such terms, and to look at the way in which a number of jurisdictions (including the Common Law states of the USA, Canada, Australia, England & Wales, and the mixed legal systems of Scotland, and South Africa) and model law instruments (including the DCFR, UCC, and a number of Restatements) employ such language.

The importance of precision in the usage of such words is frequently demonstrated in case law in which the terms are employed. Only yesterday, the Court of Session handed down a new judgment (in the case of Edgar v Edgar) in which one basis for the court's finding in favour of the pursuer rested upon whether a disposition granted by her in favour of the defender was or was not "gratuitous" in nature (if it was, then her unilateral error in granting it could found reduction of the deed). While the court found that the disposition was indeed gratuitous in nature, the matter appears to have been of some doubt (indeed, the pursuer's counsel seems to have changed his position during the course of pleadings, from asserting that the deed was granted onerously to asserting that it was a gratuitous grant – see the discussion at paras 36-37), and the judge himself does no more than narrate his conclusion that the circumstances supported the conclusion of a gratuitous grant; there is no explanation as to the judicial understanding of what "gratuitous" means, or as to why the conclusion was reached. In this specific case, the failure to explore this issue was not as crucial as it might have been, as the judge held that, even if the grant had not been gratuitous, the defender's bad faith (coupled with the pursuer's unilateral error) would also have founded a reduction of the disposition, but in other cases the gratuitous nature of a transaction might be thrown more sharply in to focus.

This recent case is merely one example among many of the importance of defining fundamental structural language with care and precision. The book which I am currently writing will demonstrate that too often such language is used in a careless or imprecise way, something which can lead to inconsistent results and hinder the administration of justice.

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